No. 22,305

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

C & C PLYWOOD CORPORATION and VENEERS, INC.,

Respondents.

On Petition for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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On Petition for Enforcement of An Order of the
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), [1] for enforcement of its order issued against C & C Plywood Corporation

[1] The pertinent statutory provisions are reprinted in Appendix B, *infra*, pp. B-1, B-2.

and Veneers, Inc. (herein sometimes called the Companies), on April 13, 1967. The Board's Decision and Order (R. 54-59)[2] are reported at 163 NLRB No. 136. A prior Board decision, of which the Board took official notice, pursuant to stipulation of the parties (Tr. 27-28), has been reported at 148 NLRB 414. This Court has jurisdiction, the unfair labor practices having occurred near Kalispell, Montana. No jurisdictional issue is presented (R. 30; R. 40).

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Companies violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.[3] The underlying facts, most of which were stipulated at the hearing before the Trial Examiner and which are not in dispute, are summarized below.

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[2] References designated "R" are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript as reproduced in Volume II of the record. References designated "G.C.X." are to exhibits of the General Counsel and those designated "Jt. Ex." are to exhibits jointly introduced by the parties at the hearing. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Plywood, Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO.

A. Background

1. The Companies' business and corporate setup

C & C Plywood Corporation has its office and principal place of business near Kalispell, Montana, and is there engaged in the manufacture of plywood panels (R. 30; R. 13, 16, see also, *C & C Plywood Corp.*, 148 NLRB 414, 421, and *N.L.R.B. v. C & C Plywood Corp.*, 351 F.2d 224, 225 (C.A. 9)). Veneers, Inc.,operates a plant which physically adjoins the plant of C & C Plywood Corporation, where it is engaged in the production of green veneer, approximately 95 percent of which is sold to C & C Plywood Corporation (R. 30; R. 13, 16).

The Companies have common officers, share common top management, are subject to common control of their labor relations policies and share the use of office and shop facilities (R. 30; R. 13, 16). During the time here material the Companies admittedly constituted a single integrated employer within the meaning of Section 2(2) of the Act (R. 30; Tr. 40, R. 13, 16).

2. The violation of Section 8(a)(5) and (1) determined in the prior proceeding

The Board certified the Union as representative of the Companies' production and maintenance employees on August 28, 1962 (R. 31, 54; R. 14, 16, Jt. Ex. 1, see Jt.

Ex. 2 and Tr. 40). [4] The Union and the Companies thereafter executed a collective bargaining agreement on May 1, 1963, effective to October 31, 1963, and from year to year thereafter unless either party notified the other of a desire to change or terminate the agreement (R. 31, 54; Jt. Ex. 3, pp. 1, 11-12).

The contract contained a wage clause (Article XVII) stating, in part (R. 31, 54; Jt. Ex. 3, p. 10):

> A. A classified wage scale has been agreed upon by the Employer [5] and the Union, and has been signed by the parties and thereby made a part of the written Agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. * * *

On May 20, 1963, C & C Plywood Corporation, relying on the above clause, and without prior notice to or bargaining with the Union, posted a notice announcing that, effective immediately and for the next couple of months, all members of the glue spreader crews would receive premium pay, provided that they met certain production standards (R. 31, 55-56; Tr. 27-28, see 148 NLRB 414, 415, 422-424). The Union contended that this pay plan was not "premium pay

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[4] In the representation proceeding the Companies originally objected to being treated as one "employer" under the Act but did not request the Board to review the Decision and Direction of Election issued by the Regional Director containing a determination to this effect (Tr. 26, Jt. Ex. 2).

[5] The preamble to the agreement (Jt. Ex. 3, p. 1) defined "Employer" as "C & C Plywood Corporation and Veneers, Inc., both of Kalispell, Montana * * *"

within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon with the Union." After meeting with C & C Plywood Corporation on two occasions in an unsuccessful effort to induce that Company to rescind the plan, the Union filed charges — served on July 31, 1963 — that C & C Plywood Corporation had refused to bargain in violation of Section 8(a)(5) and (1) of the Act by unilaterally establishing the premium pay plan (*Ibid.*).[6]

On October 24, 1964, the Board found that C & C Plywood Corporation had unlawfully refused to bargain by the unilateral introduction of the premium pay plan for the glue spreader crews. 148 NLRB 414-419. This Court denied enforcement of the Board's order in *N.L.R.B. v. C & C Plywood Corporation,* 351 F.2d 224 (No. 19,769, decided September 10, 1965), but the Supreme Court reversed that decision with directions to enforce the Board's order. *N.L.R.B. v. C & C Plywood Corporation,* 385 U. S. 421. On August 31, 1967, this Court entered its decree in No. 19,769, pursuant to the mandate of the Supreme Court.

B. The Unfair Labor Practice — the Companies Terminate the Collective Labor Agreement and Refuse to Bargain with the Union

On August 27, 1963, the Companies wrote to the Union giving 60 days' notice of their desire to terminate the labor agreement as of October 31, 1963, and on the same day they filed with the Board's Regional Director a petition for an election (R. 31, 55; Tr. 30-31, Jt. Exs. 4, 6(a), 6(b)). In their letter to the Union, the Companies

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[6] Veneers, Inc. was not a party to that proceeding (R. 55, n. 2, 148 NLRB 414, 420). See pp. 15-17, *infra.*

further stated that they had a good-faith doubt as to the majority status of the Union, and that if this issue was not settled by November 1, 1963, the Companies would withdraw recognition of the Union on that date "pending the outcome of the [Board-conducted] election" (Jt. Ex. 4). The Union, in turn, on August 29, 1963, served on the Companies a 60-day notice of its desire to make changes in the contract and offered to meet with the Companies for bargaining purposes at a mutually convenient time (R. 32; Tr. 30-31, Jt. Ex. 5). The Regional Director dismissed the Companies' representation petition on September 26, 1963, because of the pending unfair labor practice proceeding (*supra,* pp. 4-5), and the Board affirmed his decision on December 3, 1963 (R. 31, 55; Tr. 31-32, Jt. Exs. 7, 8, 9). The Companies filed another representation petition in late January 1964, after the Trial Examiner had issued his decision in the prior unfair labor practice proceeding recommending dismissal of the complaint — a decision which, as previously noted, the Board reversed in October 1964 (R. 32, 55; Tr. 32-33, Jt. Ex. 10(a) and (b)). This petition, too, was dismissed by the Regional Director and, on review, by the Board on the ground that the unfair labor practice charges were pending (R. 32, 55; Tr. 33, Jt. Exs. 11-13).

In the case at bar, charges were filed on November 5, 1964, alleging that the Companies had refused to bargain collectively with the Union (R. 29, 55; G.C.X. 1A). The Companies admitted the allegation in the Complaint that they refused to recognize the Union for any purpose after August 26, 1964,[7] but contended that they had a good-faith doubt as to the Union's majority status in August

[7] The reasons for this date are explained, *infra,* p. 14.

1963, and, additionally, that the Union no longer represented a majority of their employees in April 1964 and thereafter (R. 55, 58; R. 14, 17-19, 45, Tr. 38, see R. 52, no. 30).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found upon the foregoing facts that the Companies were not entitled to question the Union's continuing majority status on the strength of evidence of employee disaffection coming to their attention after the unremedied unfair labor practice committed by C & C Plywood Corporation during the Union's certification year (R. 58). Accordingly, it found that the Companies violated Section 8(a)(5) and (1) of the Act by their failure and refusal to bargain with the Union on and after August 26, 1964.[8]

[8] The Trial Examiner had concluded (R. 31-34) that the Companies were not precluded from raising a doubt of the Union's majority status by reason of the unfair labor practice in the prior case (R. 34-40), but also found that the Companies did not have reasonable grounds for believing that the Union had ceased to be the majority representative. The Board reversed the Examiner on the first point (R. 55-58) and found it unnecessary to pass on the second issue (R. 56, n. 9). Since the disagreement involves solely conclusions of law, the Trial Examiner's finding on the first issue is not entitled to special weight. *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474, 494, 496; *Cheney California Lumber Co. v. N.L.R.B.*, 319 F.2d 375, 377 (C.A. 9); *N.L.R.B. v. Texas Independent Oil Co.*, 232 F.2d 447, 451 (C.A. 9); see also, *N.L.R.B. v. C & C Plywood Corp.*, 385 U. S. 421, 424, and *N.L.R.B. v. Tom Johnson, Inc.*, 378 F.2d 342, 344 (C.A. 9). "The law has not committed the decisional process to the Trial Examiner. Administration of the Act has been reposed in the Board." *Warehousemen, etc., Local 743 v. N.L.R.B.*, 302 F.2d 865, 869 (C.A. D.C.); accord: *Oil, Chemical & Atomic Workers, etc. v. N.L.R.B.*, 362 F.2d 943, 946 (C.A. D.C.).

SPECIFICATION OF POINT RELIED UPON

The Board properly found that the Companies' refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act, in view of the unremedied refusal to bargain during the Union's certification year.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANIES VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION AFTER THE EXPIRATION OF THE CERTIFICATION YEAR

Introduction

This case does not involve any dispute over the underlying facts. At issue is the Board's power to extend, beyond the year following a union certification dishonored during that year, the period during which the union's loss of majority does not affect the employer's duty to respect the certification. Also at issue is the question of whether the Board properly applied its extension policy in the present case. We show below first, that the Board has such authority in the exercise of its wide discretionary powers in matters affecting representation, and second, that the application of the Board's extension rule to this case is a reasonable exercise of its statutory obligation to encourage voluntary collective bargaining as an alternative to industrial strife.

A. The Board's policy of extending a bargaining agent's certification "year" when an employer has refused to bargain during that year is reasonable and proper

Under settled law, for a period of 1 year from the date of certification, an employer may not challenge the Union's majority status even if it becomes impaired through no fault of the employer. *Ray Brooks v. N.L.R.B.*, 348 U.S. 96, affirming, *N.L.R.B. v. Ray Brooks*, 204 F.2d 899 (C.A. 9); *N.L.R.B. v. Holly-General Co.*, 305 F.2d 670 (C.A. 9). [9] As the Supreme Court stated in *Ray Brooks, supra*, at 100:

> * * * A union should be given ample time for carrying out its mandate on behalf of its members and should not be under exigent pressure to produce hothouse results or be turned out.
>
> * * * It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time,

[9] Accord: *N.L.R.B. v. U.S. Sonics Corp.*, 312 F.2d 610, 616 (C. A. 1); *N.L.R.B. v. Henry Heide, Inc.*, 219 F.2d 46, 47-48,(C.A. 2). cert. denied, 349 U.S. 952 , *N.L.R.B. v. Satilla Rural Electric Membership Corp.*, 322 F.2d 251, 253 (C.A. 5); *N.L.R.B. v. Commerce Co., d/b/a Lamar Hotel* 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Kenneth B. McLean v. N.L.R.B.*, 333 F.2d 84 (C.A. 6); *Kingsbury Electric Cooperative, Inc. v. N.L.R.B.*, 319 F.2d 387, 391 (C.A. 8); *N.L.R.B. v. Burnett Construction Co.*, 350 F.2d 57, 60 (C.A. 10).

> while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.[9a]

Under a corollary rule, the Board, with the approval of the courts, requires an employer who deprives the certified bargaining agent of some part of its bargaining year to bargain for a reasonable period beyond the certification year, regardless of the union's *de facto* majority. *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785; *Lamar Hotel*, 137 NLRB 1271, 140 NLRB 226, enforced *sub nom. N.L.R.B. v. Commerce Company*, 328 F.2d 600, 601 (C.A. 5), cert. denied, 379 U.S. 817; *N.L.R.B. v. Burnett Construction Co.*, 350 F.2d 57, 60 (C.A. 10); *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 382 F.2d 921, 923-924 (C.A. 5);

[9a] The Board also refuses to entertain a representation petition after the certification year has expired where the employer and the certified union have executed a collective bargaining agreement extending for a reasonable period beyond the year. *See Local 1545, Carpenters v. Vincent*, 286 F.2d 127, 130-131 (C.A. 2); *N.L.R.B. v. Marcus Trucking Co.*, 286 F.2d 583, 592 (C.A. 2); *Harbor Carriers of New York v. N.L.R.B.*, 306 F.2d 89, 91-92 (C.A. 2), cert. denied, 372 U.S. 917; *Ludlow Typograph Co.*, 108 N.L.R.B. 1463; *Purity Baking Co.*, 124 NLRB 159, 162, n. 10. The Companies argued before the Board that in order to comply with the rule just stated they were willing to recognize and deal with the Union until November 1, 1963, the date as of which they terminated the existing labor contract. (Jt. Ex. 4, see Jt. Ex. 3, pages 11-12.) We submit that it is immaterial whether the Companies, absent the unfair practice committed in May 1963, would have been obligated to recognize the Union until the end of the certification year, August 29, 1963 (*supra*, p. 3) or the termination date of the contract, October 31, 1963, since the Board found that the present unfair labor practice was committed on and after August 24, 1964 (R. 38-40, 58).

N.L.R.B. v. John S. Swift Co., 302 F.2d 342, 346 (C.A. 7); see also, *Superior Engraving Co. v. N.L.R.B.*, 183 F.2d 783, 792-793, 794 (C.A. 7), cert. denied, 340 U.S. 930, where the Court held that the reasonable time during which an employer is obligated to bargain with a certified representative is exclusive of any intervening period during which negotiations have been suspended because a dispute between them has been submitted to another Government agency for resolution. The principles which underlie the extension of the certification "year" under these circumstances are also implicit in the Supreme Court's observation that

> " * * * A bargaining relationship once rightfully established must be permitted to exist *and function* for a reasonable period in which it can be given a fair chance to succeed."

Franks Bros. Co. v. N.L.R.B., 321 U.S. 702, 705 (emphasis supplied). Therefore, the certification "year" has been extended not only where (as in the case at bar) the Board found a violation of Section 8(a)(5) during the year, but where there was a breakdown of the bargaining relationship during that period without such a finding. *Superior Engraving, supra; W. B. Johnston Grain Co., v. N.L.R.B.*, 365 F.2d 582, 586 (C.A. 10) (settlement without admission of a violation).[10]

B. The Board properly applied its *Mar-Jac Poultry* rule to this case

As shown in the Statement, C & C Plywood Corporation violated Section 8(a)(5) during the certification year by the unilateral wage increase granted the glue spreader crews. There

[10] Accord: *Poole Foundry & Machine Co. v. N.L.R.B.*, 192 F.2d 740 (C.A. 4), cert. denied, 342 U.S. 954; *N.L.R.B. v. Stant Lithograph, Inc.*, 297 F.2d 782 (C.A.D.C.), enforcing 131 NLRB 7.

can be no doubt that by unilaterally changing the wage rates of a substantial group of employees, C & C Plywood Corporation seriously obstructed the Union's performance of its representative function. As stated by the Board (R. 57-58):

> The failure to accord the Union its rightful role in the establishment of new wage rates for the glue spreader crews necessarily tended to undermine the Union's authority among the employees whose interests it was obligated to represent in such matters. The unilateral grant of wage increases, having occurred only 3 weeks after execution of a new collective-bargaining agreement, graphically portrayed to employees that their Employer was in a position to confer economic benefits that their Union was unable to extract during recent contract negotiations. Furthermore, the Union, by virtue of the unlawful conduct, was compelled to take a position which could hardly prove popular with employees in the represented unit. Thus, Respondent C & C Plywood's action forced the Union to a choice between two evils: it could resist the Company's action, thereby risking disaffection from the group of employees whose wage increases it would appear to oppose in resisting the Company's unilateral actions, or it could acquiesce in

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[11] According to a stipulation by counsel for C & C Plywood Corporation in the prior case (C.A. 9, No. 19769, Board Case No. 19-CA-2686, Tr. 44), the total number of employees on the glue spreader crews was 26 on April 1, and May 1, 1963, 30 on June 1, and 32 on July 1, August 1, and September 1, 1963. The number of employees in the bargaining unit eligible to vote in the Board election on July 26, 1962, was 134 (Jt. Ex. 4, p. 1).

> the Company's action, thereby demonstrating its unwillingness, if not its inability, to protect and maintain the carefully worked out wage differentials established in the collective-bargaining agreement. Either choice would necessarily expose the Union to a charge of unsatisfactory representation of employee interests and weaken its prestige and authority as their representative, with erosion of majority status the probable result.
>
> On the basis of the foregoing considerations, we are satisfied that Respondents were not entitled to question the Union's continuing majority status on the strength of evidence of employee disaffection coming to their attention in the aftermath of Respondent C & C Plywood's unremedied unfair labor practice. Accordingly, we find that Respondents violated Section 8(a)(5) and (1) of the Act by their failure to bargain collectively with the Union on and after August 26, 1964. [Footnotes omitted.]

The record also supports the Board's rejection of the Companies' contention that the refusal to bargain found in the previous proceeding could not have seriously affected the Union's position as the collective bargaining representative of the employees. The Board found on this issue (R. 58) that C & C Plywood's action was "highly visible involving, as it did, a change in the schedules of compensation negotiated a short 3 weeks earlier," and that there was "a distinct probability that the employee disaffection with their bargaining representative relied upon by * * * [the Companies] is ground for their refusal to bargain with the Union was caused by the prior unfair labor practice." The Board's evaluation of the importance and possible effect of the prior refusal to bargain accords with the Supreme Court's holding in *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. at 429, n. 15, "* * * the real injury in this case is to the union's status as bargaining representative." As the Court further observed, "* * * the Board has not construed a labor agreement to determine the extent of the contractual rights which

were given the union by the employer. * * * It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment - - 'to provide a means by which agreement may be reached.' " See also, *N.L.R.B. v. Katz*, 369 U.S. 736, 741-743, 747-748; *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 221, 225.

Accordingly, the Board was warranted in finding that this unremedied conduct in derogation of the Union's certification–and less than 3 weeks after the Company's execution of a bargaining agreement–precluded them from questioning the certified Union's majority status.[12] The propriety of this conclusion does not depend on a finding that such unlawful conduct was in fact the cause of any loss of the Union's majority. As this Court held in *N.L.R.B. v. Andrew Jergens*, 175 F.2d 130, 134-135 (cert. denied, 338 U.S. 827):

> * * * it is reasonable to assume that in the presence of unfair practices a decline in employee support does not reflect an untrammeled expression of the employees' will, and that the unfair labor practices must be purged before the representation question can be accurately determined.

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[12] In accordance with the date alleged in the complaint, the Board found that the Companies' refusal to bargain violated the Act on and after August 26, 1964, 2 days after the Board's decision in 148 NLRB 414 which found the prior unilateral conduct to be unlawful (R. 39, 58, G.C. Ex. 1(b), Par. 8). The Companies are in no way aggrieved by this ruling; for the limitations period imposed by Section 10(b) of the Act empowered the Board to find that the Companies' refusal to deal with the Union constituted a statutory violation on and after May 5, 1964, 6 months prior to the date of the charge. See, *Aero Corp.*, 149 NLRB 1283, 1285, 1293, 1345-1346, enforced, 363 F.2d 702 (C.A.D.C.), cert. denied, 385 U. S. 973.

Accord: *Sakrete of Northern California, Inc., v. N.L.R.B.*, 322 F. 2d 902, 909 (C.A. 9), cert. denied, 380 U.S. 961. No different result is indicated by the Companies' offer of proof (Tr. 28-30) that the number of employees in the unit had substantially increased and that of 201 employees in the unit on September 3, 1963 (a week after the Company withdrew recognition), only 78 had been in the Companies' employ in July 1962, the date of the representation election. We submit that neither turnover of employees, nor increase in the number of employees in the unit since the Union acquired representative status, in any way detracts from the Union's right to represent a unit of employees who voted for it in a certification election and whose support was subjected to the erosive effect of a visible disregard of the Union's representative function. *N.L.R.B. v. Katz*,369 U.S. 736, 748, n. 16; *N.L.R.B. v. Luisi Truck Lines,* F.2d , 66 LRRM 2461, 2464, 56 LC (C.C.H.) Par. 12,246 (C.A. 9, No. 21554, Oct. 27, 1967), where this Court upheld a bargaining order and found immaterial the employer's contention that only 1 out of 10 employees in the unit at the time of the bargaining demand was still in its employ at the time of the court proceedings.

We now turn to the defenses raised by the Companies before the Board and in their answer before this Court to the effect (1) that Veneers, Inc., had not been found guilty of an unfair practice in the prior proceeding and, therefore, had not violated Section 8(a)(5) and (1) in 1964; (2) that the Board erred in not ordering an election after the expiration of the contract upon the Companies' petition; and (3) that the Companies, in August, 1963, had a good faith doubt as to the Union's majority status and were, therefore, not obligated to continue recognizing and bargaining with the Union.

1. As shown, *supra,* p. 3, the Board found in the case at bar that both Companies had violated Section 8(a)(5) and (1) of the Act and ordered them to remedy the violations found. The Companies argued before the Board (R. 47, n. 10) and again

before this Court (R. 63, III(1)) that Veneers, Inc., was not a party to the 1963 proceeding and that, therefore, the Board could not properly find that that corporation violated the Act by its 1964 refusal to honor the certification issued with respect to the employees of both companies. However, the stipulated record shows that the two corporations have common officers and share common top management; they are subject to common control of their labor relations; their plants are adjoining; they accepted the ruling of the Regional Director (Jt. Ex. 2) that they constitute one "employer" under the Act, and they entered into one working agreement with the Union (Jt. Ex. 3).[13] While that agreement contains separate classifications and wage rates for C & C Plywood Corporation and Veneers, Inc. (Jt. Ex. 3, pages following the signatures), Article XVII (set out, *supra,* p. 4), dealing with premium rates covers both plants, and the unilateral introduction of the premium pay plan for the glue operator crews of C & C Plywood Corporation was purportedly based on this article and was introduced by Thomason, the general manager of both plants. See 148 NLRB 414, 423, 425. In its letter of May 27, 1963, addressed to "C. O. Thomason, General Manager, C & C Plywoods and Veneers, Inc." , the Union protested the unilateral introduction of the plan and claimed that it was not justified by Article XVII,[14] a contention sustained by

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[13] In addition, the Regional Director found in the Decision and Direction of Election (Jt. Ex. 2, p. 2) that the Companies share a single general manager; that the plant superintendent of C & C Plywood Corporation hires employees for both plants; that the logs which enter the Veneers, Inc., production line to be made into veneer usually end up as plywood panels after the bulk of the veneer passes through the production line of C & C Plywood Corporation; that one fireman operates the boilers of both plants; and that the millwrights of both Companies intermingle, their work overlaps, they use the same shop, and they receive the same wage rate. Moreover, both Companies' employees during the 60-day "training period", and both Companies' carpenters and electricians, receive the same pay rate. The Companies have no other common job classifications. (Jt. Ex. 3, pages following the signatures).

[14] 148 NLRB at 424, and General Counsel's Exhibit 4 in Board Case 19-CA-2686, submitted to this Court in Case No. 19,769.

the Supreme Court. Under these circumstances, the Board was clearly entitled to treat the two Companies as one for the purpose of the Section 8(a)(5) and (1) findings. *N.L.R.B. v. Stowe Spinning Co.*, 336 U.S. 226, 227; *A. M. Andrews Co. of Oregon v. N.L.R.B.*, 236 F. 2d 44 (C.A. 9); *Majestic Molded Products, Inc. v. N.L.R.B.*, 330 F. 2d 603,607-608 (C.A. 2).[15] Particularly because the 1963 flouting of the Union's certification was committed by both corporations' general manager in erroneous reliance on a contract provision executed by both corporations and covering both corporations' employees, the Board properly found that in 1964 both corporations were still bound by the certification even though the 1963 proceeding resulted in an order naming C & C only. See, *N.L.R.B. v. Parran*, 237 F.2d 373, 375 (C.A. 4); *Makela Welding, Inc., v. N.L.R.B.*, 56 L.C. para. 12352 (C.A. 6), December 15, 1967); *N.L.R.B. v. Colten*, 105 F. 2d 179, 180-183 (C.A. 6); *N.L.R.B. v. Hopwood Retinning Co., Inc.*, 104 F.2d 302, 303-305 (C.A. 2).[16] In any event, Veneers, Inc., should not be permitted to benefit by C & C's unfair labor practices, since the "two affiliated companies * * * adopted a common policy and front for labor matters designed to serve joint rather than separate interests." *Majestic Molded Products, Inc., supra*, 330 F.2d at 608. Because both affiliated Companies withdrew recognition from the Union after its certification had been flouted by the prior unfair labor practice, it is only fair that the Board's order be directed against both.

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[15] Accord: *N.L.R.B. v. Lexington Electric Products Co.*, 283 F.2d 54, 57, (C.A. 3), cert denied, 365 U.S. 845; *N.L.R.B. v. Parran*, 237 F. 2d 373, 375 (C.A. 4); *N.L.R.B. v. W. L. Rives Co.*, 328 F.2d 464, 468 (C.A. 5); *N.L.R.B. v. City Yellow Cab Co.*, 344 F.2d 575, 576 (C.A. 6); see also *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 907 (C.A. 9), cert. denied, 379 U.S. 961, and *Harvey Aluminum, Inc., et al. v. N.L.R.B.*, 335 F. 2d 749, 757 (C.A. 9), remanding, on other grounds, 139 NLRB 151.

[16] No claim has been made that Veneers, Inc., was not aware of the unfair practice proceeding in the prior case. Moreover, it is settled that service on one corporate entity of a group constituting a single employer is adequate notice to all. *Potter v. Castle Construction Co.*, 355 F.2d 212, 213-215 (C. A. 5), and cases cited; *N.L.R.B. v. Deena Artware*, 310 F.2d 470, 473 (C. A. 6).

2. In accordance with its policy of long standing, the Board does not proceed with a representation case while charges are pending against an employer or the effects of prior unfair labor practices have not been dissipated. See *American France Line*, 3 NLRB 64, 75, 76; *Western Union Telegraph Co.*, 32 NLRB 210 217; *Columbia Pictures Corp.*, 81 NLRB 1313, 1314-1315; Cox, *Labor Law: Cases and Materials* (1958) 341-342. The reason for this rule is that employees cannot exercise true freedom of choice in the face of interference and coercion, and, as the Board held in *Int'l Hod Carriers, etc.*, 135 NLRB 1153, 1165, the Act does not "compel the holding of an election * * * where because of unremedied unfair labor practices * * * a free and uncoerced election cannot be held." The Board's policy in this respect has been approved by this and other courts. *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206, 209, n. 2 (C.A. 9); *N.L.R.B. v. Auto Ventshade, Inc.*, 276 F.2d 303, 307-308 (C.A. 5); *N.L.R.B. v. Local 182, I.B.T.*, 314 F.2d 53, 59-60 (C.A. 2); *Surprenant Mfg. Co. v. Alpert*, 318 F.2d 396 (C.A. 1); *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 382 F.2d 921-924 (C.A. 5); *N.L.R.B. v. Commerce Co., supra*, 328 F.2d at 600 (C.A. 5); *Furr's, Inc. v. N.L.R.B.*, 350 F. 2d 84, 85-86 (C.A. 10); see also *Int'l Telephone & Telegraph Co. v. N.L.R.B.*, 382 F.2d 366, 369 (C.A. 3), petitions for cert. pending, Nos. 772, 773, Oct. Term 1967.[17]

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[17] In their brief to the Trial Examiner, the Companies claimed that the Board's policy of refusing to conduct an election during the pendency of unfair labor practice proceedings constituted a "rule" which was not valid because it had not been issued in accordance with the Administrative Procedure Act. This argument is insubstantial since it is settled that the Board, like other administrative agencies, may enunciate principles and policies by either the method of rule making or the process of case-by-case adjudication. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 348-349; *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803; *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 202-203. See also *N.L.R.B. v. Penn Cork & Closures, Inc.*, 376 F.2d 52, 57 (C.A. 2), cert. denied, No. 352, Oct. Term 1967, 36 U.S. Law Week 3144, and *Boire v. Miami Publishing Co.*, 343 F.2d 17, 23-24 (C.A. 5), cert. denied, 382 U.S. 824.

Nothing in the cases on which the Company relied before the Trial Examiner and the Board suggests that the Board erred herein in rejecting the Companies' request for an election and directing them to bargain. In *N.L.R.B. v. Minute Maid Corp.*, 283 F. 2d 705 (C.A. 5), the Court found (contrary to the Board) that the employer had not violated its bargaining obligation during the certification year; accordingly, the Court held, the employer could lawfully withdraw recognition because decertification petitions filed by a considerable majority of the employees in the bargaining unit after the end of the certification year warranted a good-faith doubt of majority. However, in *N.L.R.B. v. Commerce Co., supra,* 328 F. 2d at 601, the same circuit – after citing *Minute Maid* – upheld the Board's action in dismissing a decertification petition filed after the expiration of the certification "year," and requiring the employer to bargain, where the employer had refused to bargain within the certification year. As that same circuit recently observed in *Miami Coca-Cola Bottling Co., supra,* 382 F. 2d at 924, the good-faith doubt defense "necessarily must fall if there was no good faith bargaining during the certification year." The Companies' reliance on *N.L.R.B. v. Warrensburg Board & Paper Co.*, 340 F. 2d 920 (C.A. 2), is equally misplaced. The Court there held that despite the union's prior loss of majority, an employer had violated Section 8(a)(5) by refusing to sign, during the certification year, a labor contract agreed on with the union. The Court pointed out that after the end of the certification year the employees might have filed a decertification petition, that alternatively, the employer might have filed a petition at that time, and that "[n]o showing was made * * * that the Board, supposing that * * * [the employer] had filed a petition for decertification would decline to process the * * * petition." *Loc. cit.* at 924, n. 5. Nothing in the decision suggests that the Board must hold an election during the pendency of an unfair labor practice

charge, particularly where, as here, the charge was ultimately found to have been justified.

3. In their Answer before this Court, the Companies allege that "the parties stipulated the existence of the Employers' good-faith doubt" of the continued majority status of the Union (R. 64, No. 4), and that there was no "evidence of any anti-union animus" on their part (R. 64, No. 7). The first contention is not supported by the record because the stipulation between the parties refers only to allegations concerning information obtained by the Companies about the employees' alleged desire no longer to be represented by the Union after the prior refusal to bargain (Tr. 28-30). As we have shown *supra*, pp. 14-15, such defection would not have relieved the Companies of their duty to bargain, and the General Counsel properly objected to the offered evidence on this issue as irrelevant (Tr. 30). We submit, moreover, that the alleged good faith constitutes merely an erroneous view of the law concerning the Union's continued status as the employees' bargaining representative, and that the violation committed by the Companies' does not depend on antiunion animus. It is settled law that "[e]ven though the offending party's view of the law is honestly mistaken * * * good faith is not available as a defense to a charge of refusal to bargain." *N.L.R.B. v. Amalgamated Lithographers of America*, 309 F. 2d 31, 42 (C.A. 9), cert. denied, 372 U.S. 943.[18] It is also immaterial

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[18] Accord: *Int'l Ladies' Garment Workers' Union, etc. v. N.L.R.B.*, 366 U.S. 731, 739; *Old King Cole v. N.L.R.B.*, 260 F. 2d 530, 532 (C.A. 6); *Timken Roller Bearing Co. v. N.L.R.B.*, 325 F. 2d 746, 754 (C.A. 6), cert. denied, 376 U.S. 971; *Florence Printing Co. v. N.L.R.B.*, 333 F. 2d 289, 291 (C.A. 4); *N.L.R.B. v. My Store, Inc.*, 345 F. 2d 494, 498, n. 2 (C.A. 7), cert. denied, 382 U.S. 927; *N.L.R.B. v. Burnett Construction Co.*, 350 F. 2d 57, 60 (C.A. 10).

that during part of the period of time during which the Companies refused to bargain, they had been held by this Court not to have violated the Act during the certification year. See *Int'l Union of Electrical Workers, etc. v. N.L.R.B.; Erie Technological Products, Inc. v. N.L.R.B.*, 328 F. 2d 723 (C.A. 3), enforcing *Erie Resistor Corp.*, 132 NLRB 621, where, as here, the Court of Appeals had originally dismissed the complaint and the Supreme Court had found a violation (373 U.S. 221). The Third Circuit held, after remand, that "[a]n employer who pursues a course of conduct later determined to be an unfair labor practice does so at his peril." (328 F. 2d at 724).[19] See also *Katz, supra*, 369 U.S. at 743: "Clearly the duty [to bargain] thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact* – 'to meet * * * and confer' – about any of the mandatory subjects." [Emphasis in original.] Accord: *Miami Coca-Cola Bottling Co., supra*, 382 F. 2d at 924.

[19] It is to be noted that that case involved substantial backpay awards (see 132 NLRB at 632-636), whereas in the case at bar the Companies were only ordered to bargain in good faith with the Union.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.[20]

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National Labor Relations Board.

January 1968.

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[20] There is no substance to the Companies' argument in their answer filed with this Court (R. 63-64) that, because counsel for the General Counsel filed no exceptions to the Trial Examiner's finding that the Companies' refusal to bargain was unlawful, the Board could not (as it did) reach the same result for different reasons. Section 10 (c) and (e) of the Act (*infra*, pp. A4-A5) leaves the Board "free to use its own reasoning," and does not restrict it to the reasoning used by the Trial Examiner. *N.L.R.B. v. WTVJ, Inc.*, 268 F. 2d 346, 348 (C.A. 5). In fact, as held by this Court, even if no exceptions are filed to the decision of a trial examiner recommending dismissal of the entire complaint, the Board may reverse and issue an order against respondent. *N.L.R.B. v. M. L. Townsend,* 185 F. 2d 378, 384, cert. denied, 341 U.S. 909. These decisions accord with the legislative history of Section 10(c) of the Act, as amended by the Labor-Management Relations Act of 1947, which strongly suggests that the relevant portion of Section 10(c) was enacted to reduce the Board's workload, and not for the purpose of limiting its powers. See the statements by Senator Taft, 2 Leg. Hist., 1947 Act (U.S. Government Printing Office, 1948) 1542 and 1625.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,

National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer–

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

(d) For the purpose of this section, to bargain collectively is the performance of the obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification–

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:

* * *

In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation,

any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order or for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations,

if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Table of Exhibits Presented Pursuant to Rule 18(f) of the Rules of this Court

(Numbers are to pages of reporter's typewritten transcript)

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a) through (f)	4	4	4
1(g) through (k)	24	24	25

JOINT EXHIBITS

1	26	26	39
2	26	26	39
3	27	27	39
4	30	30	39
5	31	32	39
6	31	31	39
7	31-32	32	39
8	32	32	39
9	32	33	39
10	33	33	39
11	33	33	39
12	33	33	39
13	33	33	39
14	34	34	39

No.	Identified	Offered	Received in Evidence
15	34	34	39
16	34	34	39
17	34	34	39
18	35	35	39
19	35	35	39
20	37	37	39
21	37	37	39